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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 1145

KALMAN GREENHILL and FRANK PROCTOR, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 25, 1962.

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Kalman Greenhill and Frank Proctor pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 25, 1962.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated January 25, 1962, is reported in 298 F. 2d 405, and a copy is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1962, and a timely petition for rehearing was denied on March 27, 1962. On April 16, 1962, Mr. Justice Black signed an order extending the time for filing this petition for a writ of certiorari to and including May 25, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Court of Appeals granted an order staying execution of its decree to May 31, 1962, the stay to continue in force until final disposition of the case by this Court.

QUESTION PRESENTED

Whether a federal court conviction for fraud is consistent with that regularity and fairness which should characterize the administration of justice in the federal courts where (1) the trial is conducted in an atmosphere of hostility and prejudice, and (2) the inadequacies of proof and explanation of complex financial transactions involved in the prosecution make the jury verdict untrustworthy and subject to the influences of hostility and prejudice.

STATEMENT OF THE CASE

Petitioners were tried by jury in the United States District Court for the Northern District of Alabama and found guilty of nine counts of using the mails to defraud (18 U.S.C. § 1341) and of ten counts of fraud in the sale of securities by use of the mails (15 U.S.C. § 77q (a)(1)). Petitioner Greenhill was sentenced to three years imprisonment and petitioner Proctor to two years imprisonment. These convictions were af-

firmed on appeal to the United States Court of Appeals for the Fifth Circuit.

The gravamen of the offenses was alleged to be the wilful formation of a scheme to defraud certain persons named in the indictment by inducing them through false representations to renew subordinated debenture bonds or to buy short term notes issued by Alabama Acceptance Corporation.

The trial began on April 18, 1960, and concluded with the return of the jury's verdict on April 30, 1960. The record consists of 1,999 pages, with more than 300 exhibits. All of this was described by the Court of Appeals as "the mass of testimony, the multitudinous exhibits and the unusual length of the trial."

For present purposes, it is unnecessary to detail "the mass of testimony," it being sufficient to refer in that respect to the opinion of the Court of Appeals attached hereto. In its simplest terms, as the Court of Appeals noted, petitioners' alleged scheme to defraud was designed "to channel monies into their pockets from Alabama Acceptance Corporation . . . coupled with the false representations to investors in Alabama Acceptance Corporation, and the use of the mails."

John Murray in 1956 acquired control of Alabama Acceptance Corporation, an Alabama automobile finance company. Murray sought out petitioner Greenhill, a member of the New York bar for the past 37 years and a financial consultant in New York, and paid him a fee as a financial advisor. Murray submitted financial statements to Greenhill which indicated that Alabama was a solvent corporation. Greenhill suggested that Alabama undertake a program of

acquisition and merger of other companies. Greenhill offered his assistance in this program and that of his associate Frank Proctor, petitioner herein, an industrial engineer who graduated from the University of Pittsburgh. Proctor was to act as an industrial broker in finding and evaluating businesses for sale and Greenhill was to negotiate the terms, conditions and financing of the transactions. Neither Greenhill nor Proctor had ever been convicted of any crime.

As this relationship progressed, Greenhill and Proctor incorporated as a New York corporation, known as Frank Proctor & Associates, Inc. This corporation, together with the individual petitioners and other companies owned by petitioner Greenhill, entered into an agreement with Alabama Acceptance Corporation formalizing the acquisition and merger program. This contract was modified from time to time. In essence, it provided that Frank Proctor & Associates, Inc., was to assist Alabama—as financial consultant and in the management of the properties acquired through purchase. Compensation was established at $25,000 a year each for Murray and Proctor and $50,000 a year for Greenhill.

Pursuant to this program, Alabama acquired six corporations by purchase during 1956 and 1957. More than $1,000,000 was paid by Alabama for these subsidiaries. About 50 or 60 companies had been investigated by Proctor and about a dozen were seriously considered in this program.

In October, 1957, Greenhill began discussing with the owners of Cornucopia Gold Mines, Inc., the possibility of Alabama selling its subsidiaries to Cornucopia, in return for 2,000,000 shares of Cornucopia stock. Both Greenhill and Proctor insisted that this stock be registered. An agreement of sale to that effect was signed

and in November, 1957, Cornucopia took control of the subsidiaries. But Alabama never received the 2,000,000 shares of Cornucopia stock due it under this agreement. When Alabama went into bankruptcy in March of 1958 attempts were still being made to compel issuance of the Cornucopia Stock. Cornucopia itself went into bankruptcy in July of 1958, due to corporate losses and the defalcations of its president Earl Belle, and all of the subsidiaries which had been acquired by Alabama and sold to Cornucopia were taken back by their former owners to satisfy unpaid balances.

The foregoing transactions were alleged in the indictment to constitute a scheme on the part of Greenhill, Proctor, Murray and others to defraud the investors and creditors of Alabama Acceptance Corporation. The key to this plan was said to be profits to Frank Proctor & Associates, Inc., which were then paid out to petitioners Greenhill and Proctor in salaries, expense accounts and loans. The record shows, however, that Frank Proctor and Associates, Inc., actually lost money.

Newspaper advertisements and brochures mailed to prospective investors in Alabama Acceptance Corporation were alleged to have given a false picture of Alabama's financial condition and to have misrepresented its ability to pay high interest. Petitioners denied that they had engaged in any scheme to defraud and asserted that all losses suffered were the result of a *bona fide* bankruptcy and the actions of other creditors.

It was against this background that the trial proceeded, leading to a series of incidents depriving petitions of their right to a fair trial in a federal criminal proceeding.

REASONS FOR GRANTING THE WRIT

During the course of the proceedings in the District Court, a series of incidents occurred which, considered together, served to deprive petitioners of their right to that regularity and fairness which should characterize the administration of criminal justice in the federal courts. The probable cumulative effect of such incidents upon the jury was so great as to warrant review by this Court in terms of its power over the supervision of criminal justice in the federal courts. *Berger* v. *United States*, 295 U.S. 78; *Marshall* v. *United States*, 360 U.S. 310; *Saldana* v. *United States*, 365 U.S. 646.

The basic factors of unfairness permeating this case are twofold: prejudice against petitioners and incomplete and misleading presentation of complex facts.

A. Prejudice

1. Petitioners were tried in the Northern District of Alabama despite allegations, uncontradicted by the Government, that (a) a great amount of newspaper, radio and television publicity in the State of Alabama in connection with the collapse of Alabama Acceptance Corporation had been directed against petitioner Greenhill, a New Yorker, and (b) great hostility against petitioners had been engendered in that State by reason of the financial losses suffered by local citizens in the business failure of Alabama Acceptance Corporation. R. 56-63.

The District Court denied a motion filed under Rule 21(a) of the Federal Rules of Criminal Procedure to transfer the trial to the Southern District of New

York, based upon the foregoing considerations.[1] But the District Court did not contravene those considerations in denying the motion. And the Court of Appeals, in affirming such action, merely held that there was no showing of an abuse of discretion and no showing that on voir dire any adverse publicity had affected the ability of the jurors to reach and unprejudiced decision. The essential allegation that the trial was conducted in an atmosphere of great hostility remains unchallenged.

2. Throughout the trial and in the summation to the jury, efforts were made by Government counsel to portray petitioners as rich big-city operators from New York who had bilked helpless Alabama citizens of their life savings. Petitioners' geographic origins were emphasized and reiterated. The hostility which obviously existed in Alabama against these petitioners was adroitly exploited.

Thus extensive testimony was elicited as to the floor plans of petitioners' new offices on Madison Avenue in New York, with numerous references to the "very elaborate" nature of the offices and the inclusion of a kitchenette and bar. R. 516-520. Petitioner Greenhill was questioned at length about his stays at Miami Beach hotels. R. 1751-1754, 1776-1780. Such testimony, in a case presumably devoted to proof as to the

[1] The motion also alleged, under oath, that the petitioner Greenhill was insolvent and that it would be a great burden on him to secure the presence in Alabama of the necessary witnesses in New York. R. 62-63. Based on similar grounds, petitioner Greenhill moved to sever his trial from that of three Alabama defendants (Murray and two stock salesmen of Alabama Acceptance Corporation). That motion was denied. These three defendants, however, pleaded nolo contendre and received lesser sentences than those imposed on petitioners.

existence of a scheme to defraud, could only serve to prejudice a local Alabama jury against New York defendants.

Moreover, the selection of investor witnesses to testify at the trial reflected this general aura of hostility. One such witness produced by the Government had paid for his investment out of insurance proceeds received upon the death of his son (R. 1007, 1009); another witness, saved by the Government to the end of its case, was blind and needed his mother to read matters to him (R. 1163-1170); one investor witness was 78 years of age (R. 1016); another had paid for her note with a social security check (R. 931, 933); and still another had used cash savings to invest in Alabama Acceptance Corporation (R. 844, 853). While the Government obviously has virtually untrammeled choice in its selection of witnesses, in the circumstances of this case the choice it made clearly added to the sentiments of the jury and the hostile atmosphere in which petitioners were tried.

B. Presentation of Complex Facts

The evidence presented by the Government in this case, quite apart from any claim as to its legal insufficiency, involved such complex matters and was so clearly incomplete that the resulting verdict—if it is to be ascribed any basis—must be in large part grounded in the prejudice and hostility surrounding the trial.

Most of the Government's evidence was of a financial nature, understandable only by accountants. Basic to the case was a tracing of multitudinous financial transactions, particularly those whereby the petitioners were alleged to have profited personally. More than

300 documents were introduced, received and viewed fleetingly by the jury during the two week trial. The very statement of the facts in the opinion of the Court of Appeals reveals the enormously complex nature of the Government's case.

Yet the Government's evidence, despite its possession of all relevant books and data, was woefully incomplete in its tracing of these financial matters. At the crux of that evidence was the testimony of Norman Williams, the bookkeeper of Alabama Acceptance Corporation. R. 405. The Court of Appeals conceded, however, that his testimony and the exhibit he prepared (Govt. Exhibit 62) were "substantially weakened if not destroyed by an accounting witness for appellants." But more significantly, Govt. Exhibit 62 and the other documentary evidence, as supplemented by oral testimony by Government witnesses, relate an appallingly incomplete story of the financial transactions involving the petitioners.

Indeed, petitioners' counsel below, in order to aid the Court of Appeals in understanding the Government's evidence, employed a firm of certified public accountants to analyze the record, and particularly Govt. Exhibit 62. After weeks of expert work, this firm submitted a report—which was tendered to the Court of Appeals as an appendix to petitioners' brief—which demonstrated the lack of any real proof from the complicated data that petitioners had, as Williams seemingly testified (R. 529, 543), "milked" Alabama Acceptance Corporation out of a half million dollars.[2]

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[2] Williams, referring to Govt. Exhibit 62, stated that out of $502,000 worth of checks drawn on Alabama Acceptance Corporation in connection with the acquisition or merger program only "four or five thousand dollars" worth came back to that corpora-

The Government made no effort to introduce Alabama Acceptance Corporation's books of original entry. Completely absent were the books and records of Alabama's subsidiaries, as well as any testimony with respect thereto. No records of Cornucopia Gold Mines, Inc., were brought in. And this despite the fact that all such books and records were in the custody of and available to the Government. It thus became impossible for any trustworthy judgment to be rendered as to whether undue amounts of money flowed from Alabama to its subsidiaries and then eventually into the pockets of the petitioners—as charged in the indictment.

Yet the jury, acting under pressure from the judge to complete the case so that he might start another case the following Monday (R. 1693), met for a brief hour or so on Saturday, April 30, and made a judgment that such money did in fact find its way into petitioners' accounts. R. 1930. In light of the record inadequacies, such a judgment could not have been the result of intelligent discussion and deliberation by the jurors, who obviously lacked the qualifications of expert accountants.

The Court of Appeals sought to excuse the Government's inadequacies by stating that "All witnesses, facts, and records at the disposal of the government were presented or were available to appellants for their presentation" and that there is no basis for asserting that a law offender should go free "where

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tion from its subsidiaries. R. 543. The impression was left that the remainder of nearly $500,000 went to petitioners and their cohorts. Yet a detailed analysis of Govt. Exhibit 62, in light of other record evidence, shows that only about $68,000 was traceable to petitioners, an amount clearly justified in terms of services rendered.

there is danger from the complexity of the facts of a jury being unable to understand the case." A serious question is raised by such a holding as to whether it is the defendant's burden to call witnesses available to the Government to supply vital portions of the prosecution's case, and as to whether the stigma of guilt should fall on the defendant if the jury is unable to understand the case by reason of the insufficiencies in the prosecution's case. If the answers be those given by the Court of Appeals, then a crisis is indeed presented in the administration of criminal justice in the federal courts. Up until now, it has always been "for the prosecution to make out its case." *Rearick* v. *Pennsylvania*, 203 U.S. 507, 511 (Holmes, J.).

The state of this record—i.e., the inadequacies and lack of proper explanation with respect to complex financial transactions—was such as to leave the jury ripe for the undue influences and hostilities which surrounded this case from the start. The adverse atmosphere precluded a fair trial of such incomplete and complicated matters. As in *Kotteakos* v. *United States*, 328 U.S. 750, 765, "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."

This Court has long insisted that federal criminal trials be free of such taints as infected this case. It has demanded that where errors of this nature may have crept into a case the matter be examined in "the proper setting". *Bollenbach* v. *United States*, 326 U.S. 607, 611. Where there have been appeals to sectional or local prejudices and where an atmosphere of hostility toward the defendant has been established, condemnation has been quickly forthcoming. See *New York Central R. Co.* v. *Johnson*, 279 U.S. 310, 319. And where the prosecutor has overreached himself, as

he may well have done here in the presentation of the inadequate proof, in the exploitation of hostility and in his summation to the jury, the error cannot be overlooked. *Berger* v. *United States*, 295 U.S. 78, 89; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-240. Such are the principles to be applied to this case.

CONCLUSION

Here, as in *Saldana* v. *United States*, 365 U.S. 646, 647, the "combination of circumstances" makes the result "not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts." That is true even though each circumstance, viewed separately and distinct from the total setting, might be insufficient to warrant review or reversal.

For these various reasons this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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May 25, 1962.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18439

KALMAN GREENHILL, FRANK PROCTOR, JR.,
a/k/a FRANCIS E. PROCTOR, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the Northern District of Alabama.

(January 25, 1962)

Before RIVES, CAMERON, and BELL, Circuit Judges.

BELL, Circuit Judge: This consolidated appeal comes to us on a record of 1,999 pages together with more than 300 exhibits. It is from final judgments and sentences imposed upon a jury verdict finding appellants guilty on nine counts of using the mail to defraud[1] and ten counts of fraud in the sale of securities by the use of the mails[2] in that they willfully devised a scheme to defraud certain persons named in the indictment by inducing them through false representations to buy subordinated debenture bonds or short term notes issued by Alabama Acceptance Corporation. Appellant Greenhill was sentenced to three years and Appellant Proctor to two years in the Federal Penitentiary.

Despite the mass of testimony, the multitudinous exhibits and the unusual length of the trial, this story can be

[1] Title 18, USCA, § 1341 makes it a crime to use the mails in furtherance of a scheme to defraud or to obtain money or property by means of false or fraudulent representations.

[2] Title 15, USCA, § 77g(a)(1) makes it unlawful, and subject to the penalties set out in Title 15, USCA § 77x, in the sale of securities by the use of the mails to employ any device, scheme or artifice to defraud.

simply told. In March of 1956, John Murray, who was jointly indicted with appellants and who entered a plea of nolo contendre on the day trial commenced,[3] acquired control of Alabama Acceptance Corporation, an Alabama corporation with its principal place of business in Birmingham by buying for $12,500 in notes all of the outstanding stock of Beech Investment Company, Inc., an Alabama corporation which owned fifty one percent of its capital stock. Murray became chief executive officer of Alabama Acceptance, an automobile finance company which was losing money when he bought it.[4]

John Murray was advised by Milton Linn of Miami, Florida to get in touch with Appellant Greenhill, a New York attorney but more recently doing financial consulting, about the financial problems of Alabama Acceptance Corporation. Murray made an appointment to see Greenhill at his two room office located at 1407 Broadway in New York on the condition that he pay Greenhill a retainer fee of $1,000. Greenhill later borrowed $5,500 from Alabama Acceptance Corporation to pay Mr. Linn as a brokerage fee for referring Murray to him. At any rate, upon payment of the $1,000 retainer fee Greenhill conferred with Murray and his accountant Williams for some hours, advising that he could not help them in the automobile financing business

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[3] Carl K. Welles and William Edward Faulk, securities salesmen for Alabama Acceptance Corporation were also jointly indicted and entered pleas at the same time.

[4] Defendant's Exhibit 141, an audit report, showed losses for the eight months' period ending February 29, 1956 of $44,904.53 and losses for the month of February alone of $11,680.94. The earned surplus as of June 30, 1955 was $52,823.02 but the losses together with dividends paid on common and preferred stock had reduced the earned surplus as of February 29, 1956 to $68.85. This statement showed capital funds of $97,375.00 in six and eight percent ten year subordinated debentures, $162,81 in preferred stock and $1.00 in common stock which together with earned surplus made a total of $260,254.85.

but suggested that Alabama Acceptance Corporation undertake a program of acquisition of other companies. Greenhill offered his assistance in such a program and that of his associate, Appellant Proctor, an engineer whose experience had been mainly in sales; Proctor to act as an industrial broker in finding and evaluating business for sale and Greenhill to negotiate the terms, conditions and financing of the transactions.

Here it should be noted that Greenhill and Proctor had for some months been associated under the style of Frank Proctor & Associates as industrial brokers. Their motivation was to earn finders fees by putting those who wanted to sell in touch with those who wished to purchase with negotiation then to be done by the would-be sellers and purchasers. In short, they knew of industries for sale and could find others and Alabama Acceptance Corporation was to become a captive purchaser.

Proctor occupied the extra office in the suite of Greenhill and he also met for a short time with Murray and Williams. This was on or about June 19, 1956. A few days later Mr. Greenhill met with John Murray in Birmingham to discuss the matter further. The long and the short of this meeting was that it was agreed that Greenhill and Proctor would undertake an acquisition program for Alabama Acceptance on conditions to be agreed upon. Greenhill while in Birmingham on this trip borrowed $3,000 from Alabama Acceptance Corporation.

In July 1956 Greenhill and Proctor chartered Frank Proctor & Associates, a New York corporation. Greenhill was never an officer of Alabama Acceptance, Frank Proctor & Associates or any of the other related corporations. Proctor was president of Associates and became a director of Alabama Acceptance. Greenhill stated to Murray at the first meeting in New York that he could not occupy any foreground position in any undertaking because of, among other reasons, his tax difficulties and previous bankruptcy.

Murray, Proctor, and Greenhill as individuals, Roland Industries, Inc., a corporation owned by Mr. and Mrs. Greenhill, and Frank Proctor & Associates entered into an agreement during the same month to the effect that Alabama Acceptance Corporation would enter into an acquisition program whereunder companies would be submitted to it for purchase by Greenhill, Proctor, Roland Industries, and Associates which program was to last for three years. A commission equal to five percent of the purchase price was to be paid to the person or firm submitting the proposal at the time title to the stock being purchased passed to Alabama Acceptance Corporation. Thereafter this agreement was modified to the extent that Alabama Acceptance engaged the services of Frank Proctor & Associates as financial and management consultants in connection with the corporations and properties acquired and to be acquired and agreed to pay Associates for these services a sum equal to five percent of the total purchase price plus $100 per week from each subsidiary which it controlled, plus a sum equal to twenty five percent of net profits of Alabama Acceptance before taxes. Then in 1957 but retroactive to June 18, 1956, Murray, Proctor, and Greenhill entered into an agreement in which it was recited that Beech Investment Company owned control of Alabama Acceptance Corporation and that Murray owned fifty one percent of the stock of Beech and that Frank Proctor & Associates had an agreement to purchase the remaining outstanding forty nine percent of the stock of Beech and that they had formed various other corporations since June 18, 1956 and others would be formed in the future. They then agreed that with the exception of Alabama Acceptance and Beech the three of them would own one third each of every other corporation organized including Frank Proctor & Associates, Inc., a New York corporation; Frank Proctor & Associates, Inc., a Florida corporation; Alabama Capital Corporation, a New York Corporation; Central Capital Corporation, a Florida corporation; and Allen Capital Corporation, a New

York corporation. They agreed also that in regard of these holdings and all future holdings all increments, dividends, additional issues or incomes, or income or property received by any of the companies or by either of the parties as commissions or broker fees or any other compensation would be divided equally amongst the three, and all of this was to be true notwithstanding the manner in which the holdings might be reflected on the records of any of the companies. Lastly, in this agreement it was specified that each would be employed for a period of ten years from June 18, 1956 to devote full time and attention to the interest of all companies covered in the agreement with Murray and Proctor to receive $25,000 per year and Greenhill to receive $50,000.

Appellants, in cooperation with Murray, then set out on an acquisition program. The pattern of acquisition was a small down payment and a large mortgage whether acquiring stock or assets, with emphasis on assets, and with little or no regard being given to the profit record of the companies being acquired. Only one subsidiary prospered. Companies were acquired publishing small newspapers, operating printing plants, and manufacturing water heaters, radar parts, and parts for aircraft and missiles as well as electric fans. Many companies were investigated and not purchased and in three instances options were purchased but final acquisition did not take place. In one of these Frank Proctor & Associates collected a fee of $25,000 which was never repaid to Alabama Acceptance although the refund was carried on the books of Alabama Acceptance as an account receivable.

The key to the arrangement or plan contrived by appellants and Murray was profits to Frank Proctor & Associates which was in turn paid out to appellants in salaries, expense accounts, and loans. These came through the medium of the agreed finders or brokerage and management fees. The contract as to management fees was dis-

regarded. For example, one subsidiary was paying Associates on the basis of $15,000 per annum.

In the fiscal year ending June 30, 1957, Associates had an income of approximately $96,000, virtually all of which came from Alabama Acceptance in connection with the acquisition program. Proctor was paid $24,500 and Greenhill $53,000 in salary out of Associates for this period. This did not include loans to Greenhill from Alabama Acceptance or Associates. Loans also were necessarily made to Associates so that salaries and expenses could be paid as Associates, according to its federal income tax returns had liabilities exceeding assets by more than $30,000 as of the end of the fiscal year. The capital account was only $1,500 and losses were over $30,000. Greenhill was not an officer of Associates but was working under the salary agreement with Murray and Proctor. Proctor was President of Associates.

Greenhill and Proctor prospered to the extent that they moved out of the small offices on Broadway to Madison Avenue where they occupied a spacious suite complete with reception room and conference room. Greenhill was spending a substantial amount of time at the Eden Roc and Americana Hotels at Miami Beach, Florida with Alabama Acceptance and Associates each reimbursing him for forty percent of his expenses. His purpose in being there was to make contacts and on one occasion reported that he had obtained a $25,000 line of credit for one of the subsidiaries through one of his contacts there. He was also supervising the sale of securities in that area.

Alabama Acceptance Corporation and all of its subsidiaries were dominated by Murray, Proctor, and Greenhill during this period of the acquisition program insofar as the program and the financing was concerned. Funds were needed to keep the program going and plans and efforts were intensified to sell long term debentures and short term notes to the investing public. Murray and Proctor

were concentrating on Alabama while Greenhill was lending his efforts to the Miami area. Welles was the Sales Manager in Alabama under Murray and Proctor while Faulk was in charge of sales under Greenhill in the Miami area. Alabama Acceptance Corporation, even before it was acquired by Murray had engaged in selling long term debentures to the public. Among their sales pitches was a representation made in person, through the mail and by way of newspaper advertisements to prospective investors and investors being asked to reinvest that the corporation could afford to pay high interest because it was an income tax deduction. The following is a quote from a standard newspaper advertisement:

> "HOW . . .
> "Alabama Acceptance Corp.
> "Can Pay 7% Interest
> "Interest is a cost of doing business. Our income taxes are 52%, and, therefore, Uncle Sam absorbs more than half of our interest cost. Our net interest costs, therefore, approximately 3.8%."

This representation was continuously made although Alabama Acceptance Corporation paid no federal income tax whatever because of no earnings during the entire period in question here. Its only association with income taxes was to receive refunds on account of losses.

Another pitch was through the medium of a pamphlet entitled "Alabama Acceptance Corporation—A Story of Interest," a brochure which was the basic literature of the company directed to prospective investors and which was prepared by an advertising man under the direct supervision of Greenhill and Proctor. "Financial Highlights" in this brochure were stated as of January 1, 1957 to be "working capital in excess of $800,000 and net worth in excess of $600,000". As of June 30, 1957, working capital was stated in this brochure to be $1,850,000, and net worth

to be in excess of $760,000. Though not so stated the fair implication was that these figures reflected consolidated figures of Alabama Acceptance and all subsidiaries. No breakdown or detail on these totals was given.

Balance sheets furnished to the State Securities Commission of Alabama told a wholly different story. The figures as of January 1, 1957, rounded off in the style of Greenhill and Proctor, did show working capital, by including capital stock, surplus, the reserve for unearned discount, and the total of the subordinated debentures to be in excess of $800,000, but this included surplus based on a write up of fixed assets purchased under the acquisition program of over $464,000. The net worth was a little less than $600,000 but this also included the write up of fixed assets. The earned surplus had shrunk to a deficit of over $51,000. No investor could possibly know the true status of working capital or net worth from the brochure.

The balance sheet furnished the state for the quarter ending June 30, 1957, showed a startling discrepancy when compared with the figures represented in the brochure to be the "Financial Highlights" as of that date. Instead of working capital being in excess of $1,850,000 as represented, it was a little less than $800,000 including a figure of $166,271.29 entitled "minority interest in subsidiaries", and net worth instead of being $760,000 as represented was a little less than $400,000. The write up of the surplus from fixed assets had decreased from $464,000 to $222,000 because sales of properties were inexorably setting the real value. Incidentally, these statements furnished to the State Commission were put in evidence by appellants.

As of September 30, 1957, Alabama Acceptance Corporation filed a statement with the State Securities Commission showing a balance sheet on Alabama Acceptance Corporation only with no subsidiaries included. This statement showed as assets all sums invested in actually acquiring subsidiaries and for options to purchase which expired.

This statement showed a deficit in earned surplus of $345,494.92 making a deficit in net worth of $182,683.92. It will be recalled that the earned surplus of the company on February 29, 1956, a few days before Murray acquired it and a few months before the start of the acquisition program, was $68.85 and the net worth of the company exclusive of subordinated debt was at that time $162,879.85. The end was near but sales of debentures and notes to investors continued.

Greenhill in the meantime had become acquainted with the principals in Eastern Investment and Development Company and had acted as broker in their purchase of a controlling interest in Cornucopia Gold Mines, a company with approximately 4,000,000 shares of stock outstanding and listed on the American Stock Exchange. This purchase was of 1,000,000 shares at twenty five cents per share. The sales price during the latter part of 1957 ranged from a price of twenty five cents to thirty seven and one half cents per share. This company, according to a report filed with the Securities and Exchange Commission and in evidence had during the six months period ending June 30, 1957 an income of $1,774.07 and a net loss of $14,378.93. Its current assets consisted of $1,415 in cash and accounts receivable, and it had certain gold mining and uranium properties either acquired for cash or stock.

Greenhill worked out an arrangement with the principals of Eastern Investment whereby the four subsidiary properties of Alabama Acceptance Corporation remaining after previous sales would be sold to Cornucopia in exchange for two million shares of Cornucopia's stock to be issued which stock would be placed in a voting trust for ten years, with the two million shares to be divided in a manner to be later determined by and between Greenhill, Proctor, Frank Proctor & Associates and Alabama Acceptance Corporation. Greenhill advised in a letter to Accountant Williams

who was seeking information for an audit that Alabama Acceptance would receive "upwards of 1,000,000 shares" and that Greenhill and Proctor would subordinate to debenture holders and creditors any Cornucopia stock to be received and owned by them. The record is silent as to how they would acquire their stock, the consideration for which was to be the subsidiaries of Alabama Acceptance Corporation. The agreement was subject to confirmation by the Cornucopia stockholders and the approval of the Securities and Exchange Commission, only a matter of form to Greenhill. The agreement was never confirmed nor approved and no stock was ever issued to Alabama Acceptance under the agreement.

In the meantime Cornucopia, with the consent of Alabama Acceptance and the holders of mortgages to secure the unpaid balances due on the subsidiaries took possession of the subsidiaries. Each subsidiary had been foreclosed by the original owners or was in receivership at the time of the trial, and both Cornucopia and Alabama Acceptance Corporation were in bankruptcy.

In addition to the debentures and unsecured notes being sold by Alabama Acceptance Corporation, notes were also being sold, secured by stock in one of the subsidiaries, or by automobile receivables. After the Cornucopia agreement, secured notes were sold on the representation that Cornucopia Gold Mine Stock was being held in trust to secure the loan represented by the note despite the fact that no Cornucopia stock whatever was ever received by Alabama Acceptance Corporation.

When the end came to this profitless and undercapitalized corporate structure, conceived as it was by appellants, the liabilities of Alabama Acceptance were over $1,000,000 while assets were less than $100,000. Between May, 1958 and the time of the trial, April 1960, the trustee had collected only $25,600.

This was the evidence before the court and jury. The jury might well have believed that appellants, with Greenhill dominating the operation but ably assisted by Proctor, set up a scheme, simple though it was, to channel monies into their pockets from Alabama Acceptance Corporation, and that the scheme was effectuated. This, coupled with the false representations to investors in Alabama Acceptance Corporation, and the use of the mails would be an adequate basis for verdicts of conviction. At any rate the proof together with the allowable inferences was entirely sufficient and the court did not err in overruling the motions for judgment of acquittal. *Hargrove* v. *U. S.*, 5 Cir., 144, 139 F. 2d 1014 and *Riggs* v. *U. S.*, 5 Cir., 1960, 280 F. 2d 949.

As to other errors assigned, we have carefully reviewed this record and conclude that appellants had their day in court. They were fairly tried. They were ably represented on the trial. All witnesses, facts, and records at the disposal of the government were presented or were available to appellants for their presentation. There is no reasonable basis for the claim that the prosecutor was too vigorous within the rule of *Berger* v. *United States*, 1935, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314. The government was as entitled to an advocate as appellants.

The fact that the government used, without objection based on prejudice, as five out of some twenty investor witnesses one who was blind, and others who were peculiarly objects of sympathy did not deprive appellants of due process of a fair trial. Appellants and not the government made them investors and prospective witnesses.

Appellants whose counsel on appeal did not participate in the trial of the case contend that due process under the Fifth Amendment was lacking because the evidence was so complex and incomplete that the jury could not understand it without either expert interpretation or the complete records. They urge the fact that the jury returned a ver-

dict in approximately one hour as supporting the proposition that the verdict was based on either prejudice or the alleged erroneous testimony of Witness Williams, hereinafter discussed. We have set out the salient facts in some detail here to demonstrate that the evidence was not unusually complex nor was it incomplete. The exhibits were explained to the jury during the progress of the trial. It would not have been unusual for the jury to reach a verdict in an hour on the record here. We reject the unsupported theory of appellants that a law offender, being entitled to a jury trial, should go free where there is danger from the complexity of facts of a jury being unable to understand the case, appellants contending that society and not the offender in such event should suffer.

Appellants testified and now strongly contend that they had no intent to defraud. Their testimony was, and others so testified, that the acquisitions made were to the benefit of Alabama Acceptance, and that they were only attempting to help a company that was operating at a loss. The law is that honest belief in the ultimate success of the venture will not justify false representations in the sale of securities. *Danser* v. *United States*, 1 Cir., 1960, 281 F. 2d 492; *Linn* v. *United States*, 2 Cir., 1916, 234 Fed. 543; *Proffer* v. *United States*, 5 Cir., 1961, 288 F. 2d 182; *United States* v. *Crosby*, 2 Cir., 1961, 294 F. 2d 928; and *Foshay* v. *United States*, 8 Cir., 1933, 68 F. 2d 205, cert. den., 291 U. S. 674, 54 S. Ct. 418, 78 L. Ed. 1063.

Appellants also assigned as error the failure of the court to grant a motion to transfer the case under Rule 21 (a), F. R. Cr. P., to the Southern District of New York because of undue prejudice resulting from wide spread publicity in the Birmingham area. The decision of the trial court on such a motion will be affirmed where as here no abuse of discretion is shown, and lack of abuse of discretion is buttressed where as here there was no showing in the course of the voir dire examination that any adverse publicity had

effected the ability of the jurors to reach and unprejudiced decision. *Kott* v. *United States*, 5 Cir., 1947, 163 F. 2d 984, cert. den., 333 U. S. 837, 68 S. Ct. 607, 92 L. Ed. 1121; *Mayo* v. *Blackburn*, 5 Cir., 1958, 250 F. 2d 645, cert. den., 356 U. S. 938, 78 S. Ct. 779, 2 L. Ed. 2d 812; and *United States* v. *Moran*, 2 Cir., 1956, 236 F. 2d 361; cert. den., 352 U. S. 909, 77 S. Ct. 146, 1 L. Ed. 2d 117.

Appellants assert that the case of the government is based principally upon the testimony of Witness Williams, former auditor for Alabama Acceptance Corporation and that his testimony was contradicted by exhibits introduced by the government, but of course this is only a matter of weight and for the jury. They urge that the government's Exhibit 62 which was a compilation by Williams of the checks written by Alabama Acceptance to Proctor or to Greenhill or to Frank Proctor & Associates was unduly prejudicial in that it gave the jury the impression that large sums were improperly taken. They also urged on the trial and before this court that this exhibit was not admissible because it was a summary and only the original records would be admissible. The rule is that such a summary of books is admissible, provided cross-examination be allowed and the original records are available. *Cooper* v. *United States*, 5 Cir., 1937, 91 F. 2d 195 and *Kolbrenner* v. *United States*, 5 Cir., 1926, 11 F. 2d 754. The long and the short of these assertions is that the trial court postponed the trial to enable accounting witnesses for appellants to prepare their defense. All records were available to them. On the trial defense counsel objected to the exhibit in question because the checks were not available even though the original records, i.e., books of entry, were available. These checks were then presented to defense counsel on order of the court and some were used by the defense. Further, the testimony of Williams and the efficacy of this exhibit was substantially weakened if not destroyed by an accounting witness for appellants. There

was no error in the admission of the exhibit and the weight of it and the testimony of Williams was for the jury.

Having had a fair trial, the verdict being adequately supported, and the errors assigned being without validity, the judgments are

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Judgment

Extract from the Minutes of January 25, 1962

No. 18439

KALMAN GREENHILL, FRANK PROCTOR, JR.,

a/k/a FRANCIS E. PROCTOR,

v.

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

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No. 149

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648016—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 145

KALMAN GREENHILL AND FRANK PROCTOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 2001–2006; Pet. App. 1–14) is reported at 298 F. 2d 405.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1962 (R. 2017; Pet. App. 1, 14). A petition for rehearing was denied on March 27, 1962 (R. 2033). Mr. Justice Black extended the time for the filing of a petition for a writ of certiorari to May 25, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions for mail fraud and for the fraudulent sale of securities by use of the mails.

2. Whether petitioners had a fair trial.

STATUTE AND RULE INVOLVED

Section 17(a) of the Securities Exchange Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. 77q(a), provides in pertinent part:

> It shall be unlawful for any person in the offer or sale of any securities * * * by the the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> * * * * *

Section 1341 of Title 18, U.S.C., provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 21, F. R. Crim. P., provides in pertinent part:

> (a) The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.
>
> (b) The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

STATEMENT

A 20-count indictment returned in the United States District Court for the Northern District of Alabama charged petitioners and others with mail fraud and use of the mails in the fraudulent sale of securities, in violation of 15 U.S.C. 77q(a) and 18 U.S.C. 1341, *supra* (R. 12–43). After a trial by jury, petitioners were found guilty on 19 counts (R. 1930–1931, 1937). Greenhill and Proctor were sentenced to imprisonment for three and two years, respectively (R. 1934–1935, 1969–1972).[1] The convictions were affirmed on appeal (Pet. App. 1–14).

[1] Greenhill was sentenced to concurrent terms of imprisonment of two years on each of nine counts and to concurrent terms of imprisonment of one year on each of ten counts, with

The underlying scheme charged involved a reckless corporate acquisition program by Alabama Acceptance Corporation, which would then "milk" its new subsidiaries and ultimately pass on the proceeds to the defendants for their own personal benefit. The essence of the offenses here, however, is that, while the economic and financial position of Alabama Acceptance was, as they knew, steadily deteriorating to the point of bankruptcy, the defendants, using the mails, falsely represented its position in order to induce the public to invest in its securities (R. 12–43).

1. THE PROGRAM OF CORPORATE ACQUISITIONS FROM 1956 TO 1958

In March 1956, co-defendant John Murray acquired a controlling interest in the capital stock of the Alabama Acceptance Corporation, an Alabama corporation engaged in the business of discounting automobile paper with its main office in Birmingham, Alabama (R. 126–131, 132, 134–136, 407, 592, 605, 618–620). Murray became president of the company and held the office until March, 1958, when he filed voluntary bankruptcy proceedings for the corporation (R. 143, 209, 407, 588–589, 1105, 1170–1172). During this period, co-defendants William Faulk and Carle Wells were employed as securities salesmen for Alabama Acceptance.

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the one-year terms to run consecutively to the two-year terms (R. 1934–1935, 1970–1972). Proctor was sentenced to concurrent terms of imprisonment of one year on each of nine counts and to concurrent terms of imprisonment of one year on each of the remaining ten counts, with the one-year terms on the ten counts to run consecutively to the terms imposed on the first nine counts (R. 1935, 1969–1970).

The petitioners were associated in a financial consulting and industrial brokerage business in New York City under the name of Frank Proctor & Associates. Greenhill was an attorney and financial consultant; Proctor was an engineer and an industrial broker who would bring buyers and sellers of businesses together (R. 1551–1553, 1813, 1815–1816, 1854).

In June 1956, Murray and one Norman Williams, an accountant for Alabama Acceptance, sought the advice of Greenhill in New York regarding the operations of Alabama Acceptance (R. 428–431, 627–629, 679–680, 1554–1557). Greenhill was given a copy of Alabama Acceptance's financial statement for the eight month period ending February 29, 1956. This report showed that Alabama had an operating loss of about $44,900, an earned surplus of $68.85, and a net worth including capital stock of about $162,800 (R. 408–413, 422, 428–429, 1557–1558, 1623, 1703; see R. 609–612). Greenhill said that he could not be of any assistance in the finance business, but that a corporate merger and acquisition program would be helpful to Alabama Acceptance (R. 431–437, 1560–1561, 1710). He was not "particularly concerned" about the liability picture of Alabama Acceptance, but only with the amount of money that could be obtained from its assets for corporate acquisition (R. 433–434).

On July 17, 1956, an agreement was entered into between petitioners, Frank Proctor & Associates, Roland Industries (a corporation owned by petitioners and Greenhill's wife) and Alabama Acceptance whereby, for a three year period, Greenhill,

Associates and Roland Industries would submit to Alabama Acceptance "proposals and deals involving acquisitions and mergers." The submitting parties were to receive a 5% commission when a proposal was accepted and closed (R. 229–232, 1567–1568, 1712–1713, 1717). The agreement was subsequently amended to provide for the retention by Alabama Acceptance of Associates to assist in the diversification program and on financial matters, and to manage all corporations owned or to be acquired by Alabama Acceptance during the period of agreement (R. 228, 232–233, 1613–1616). Proctor was to devote his full time to the services of Alabama Acceptance, Alabama Acceptance would pay Associates another 5% of the purchase price of acquired corporations plus $100 per week for each subsidiary corporation and 25% of its net profits before taxes as shown on its consolidated balance sheets (R. 234–236, 1613–1616).

In 1957, petitioners and Murray agreed that each was to own 33⅓% of all corporations formed since June 18, 1956, including Frank Proctor & Associates (R. 238–240, 1620, 1715; see R. 565), and each was to be employed for a period of ten years, with Greenhill to receive a salary of $50,000 per year and Proctor and Murray each to receive a salary of $25,000 per year (R. 238–240, 1620, 1715–1716). The agreement was dated back to June 18, 1956 (R. 238).

From July, 1956 to late 1957, Alabama Acceptance acquired either the assets or controlling stock interests in a wide variety of corporate enterprises (R. 552–555, 558–564, 597, 601–602, 653–657, 661–662, 683–684, 700, 716–719, 759–760, 1215–1220, 1354–

1360, 1378–1382, 1385–1388, 1395–1401, 1405–1415, 1418–1424, 1439–1443, 1481–1482, 1571–1574, 1584–1590, 1592–1596, 1600–1603, 1616, 1722–1723, 1733–1734, 1738–1741, 1823–1830, 1836–1839, 1854–1856, 1857–1859). In most instances, Alabama Acceptance made a relatively small down payment on the purchase price, and committed itself through mortgages and notes for the balance (E.g., R. 1354–1359). Fees and commissions for brokerage and management services were paid by Alabama Acceptance and its subsidiaries to petitioners and Associates, and, on one occasion, Greenhill and Associates received about $20,000 from Alabama Acceptance despite the fact that the particular acquisition for which the payments were made did not materialize (R. 442, 445–446, 456, 459, 474–475, 523–533, 541–542, 547–549, 552–553, 564, 636, 644–646, 657–658, 662, 749–750, 763–764, 1276–1277, 1286–1289, 1291, 1340–1347, 1359, 1370, 1489, 1711, 1717, 1728–1731, 1737, 1856; see R. 1473–1474, 1685, 1711–1713). Alabama Acceptance, through Murray and Proctor, who was a director and the vice-president of Alabama Acceptance from July 16, 1956, to December 31, 1957, assumed control of the subsidiaries and engaged in their management (R. 213, 220–222, 684–685, 1105, 1171–1172, 1481–1482, 1488–1489, 1492, 1527–1529, 1530, 1535, 1574, 1585, 1591–1592, 1595–1596, 1603, 1822–1823, 1854). To a lesser extent, Greenhill also participated in the management of the subsidiaries (R. 1481–1482, 1492, 1527–1528). One subsidiary paid Associates a management fee of $1,250 per month (R. 1489).

Some of the acquired corporations had large operating losses at the time of acquisition by Alabama Acceptance; others showed substantial profits up to the time of acquisition but lost money thereafter (R. 1371, 1391–1392, 1447–1448, 1450, 1452, 1486, 1490, 1520, 1524–1525, 1530, 1723, 1738, 1805–1806, 1860–1861). For example, the Century Controls Corporation complex (which included a holding company and operating companies) showed an operating deficit of about $467,000 at the time of its acquisition (R. 1223–1228, 1314–1316, 1402–1415, 1447–1448, 1586–1590) and subsequently went into receivership (R. 1449–1450). Another company, the Troop Water Heater Company of Pennsylvania, had a "cash position" in 1956 of $100,000 (R. 1486, 1490). After petitioners and Murray became active in the management, Troop, at the direction of either Greenhill or Proctor, loaned Alabama Acceptance and its affiliates about $270,000 (R. 1487, 1492, 1736, 1775–1776, 1782–1788; see R. 1687–1688), and Alabama Acceptance sold Troop's operating properties for about $100,000 (R. 1487–1490). Troop paid Associates a management fee of $1,250 per month (R. 1487–1488). A receiver was appointed for Troop in July 1958 (R. 185, 1482–1484). Still another company, the Hall Lithographing Company of Kansas, which was acquired in December, 1956, had been operating a "profitable" business before acquisition (R. 1519–1521, 1524–1525, 1530), but operated at a loss thereafter. In 1957, it was sold by Alabama Acceptance to two individuals in Topeka, Kansas (R. 1524–1533). The books of Alabama Acceptance, however, never indicated that

Hall Lithographing had been sold (R. 567–569, 675–676).

2. THE FINANCIAL POSITION OF ALABAMA ACCEPTANCE

For the period ending August 31, 1956, the balance sheet of Alabama Acceptance showed an overdraft of $15,000 (R. 636–637). On instructions from Murray, Williams (an accountant for Alabama Acceptance) prepared another balance sheet which showed a cash balance of $30,000, a result arrived at by ignoring checks for $45,000 already issued by Alabama Acceptance but not yet cashed (R. 637–638, 744–745).

By December 31, 1956, the consolidated financial statement of Alabama Acceptance showed an operating deficit of $115,000 and a "net worth" of $575,846 (R. 489–490, 494–495). Included in the "net worth" figure were $74,000 worth of "bad debts" as assets and $464,804 "write-up" of assets (termed "surplus from appraisals") (R. 511–513). At this time, Alabama Acceptance was carrying over $100,000 of past due debts as assets (R. 495).

In April, 1957, Alabama Acceptance paid "dividends" of $8,140 to noteholders although the books reflected no earnings and a deficit in earned surplus of about $63,900 (R. 497–500). The books did not reflect a $60,000 debt to a New York bank (R. 500, 665).

In October 1957, a certified public accountant made a special examination of the books of account of Alabama Acceptance as of August 31, 1957. The financial report, which was mailed to Greenhill, indicated that Alabama Acceptance had a deficit in the surplus

account of $328,000 and a net worth of $166,000 in the red (R. 1113-1117, 1145). The cash receipts and general ledger of Alabama Acceptance were "out of balance," and it was difficult for the accountant to obtain information (R. 1126–1127, 1133, 1135–1136). The cash representing loan balances had been reconciled at the end of each month, and when the accountant asked for the adding machine tapes he was informed that they had been thrown away (R. 1130). Some receivables were not listed (R. 1140–1141). About sixty-four per cent of the receivables were "past due or bad." Included in this amount was $74,000 which had been previously written off as bad debts but which had been restored, at the direction of Murray, to the books as assets (R. 622–624, 639–640, 1144–1145).[2]

In January, 1958, Alabama Acceptance sold five of its subsidiaries for 2,000,000 shares of Cornucopia Gold Mines, Inc., which were to be issued in the future (R. 683–684, 700, 1214–1216, 1246, 1249, 1254–1255, 1482, 1660–1669, 1723–1724, 1764–1766). Greenhill had told the others that this would solve their financial difficulties (R. 501–503). The books of Cornucopia showed, as of June 30, 1957, an income of $1,774 and a net loss of $14,378 (R. 1258; Pet. App. 9a). It had current assets of $1,415 and certain gold mining and uranium properties (R. 1237; Pet. App.

[2] The books of Frank Proctor & Associates reflected that Associates had paid out $38,600 to subsidiaries of Alabama Acceptance, and that Alabama Acceptance owed Associates that amount of money (R. 735). But the books of Alabama Acceptance contained no corresponding entries to indicate that that amount was owed to Associates (R. 736–737).

9a). Cornucopia never issued the 2,000,000 shares in question, and the books of Alabama Acceptance never showed any interest in Cornucopia (R. 515, 1672–1674, 1723–1724, 1766). The board of directors of Cornucopia subsequently resigned, and in July, 1958, Cornucopia went into bankruptcy (R. 1245, 1259, 1766). Notes of Alabama Acceptance were, however, sold with the representation that they were secured by Cornucopia stock (R. 801–803, 1011–1013; see R. 503, 698.)

In March, 1958, Murray filed a voluntary petition in bankruptcy for Alabama Acceptance, and on May 9, 1958, Alabama Acceptance was adjudicated bankrupt (R. 143, 158, 183, 222). Total liabilities of Alabama Acceptance equaled about $1,100,000; assets totaled about $84,000, of which about $53,900 represented past due debts, and 3,030 shares of the Auto Discount Company (R. 155, 163–166, 167, 172–176). The Auto Discount Company stock was not recorded in the books of Alabama Acceptance (R. 174). Included in the $84,000 asset figure were notes from Greenhill and Murray for about $5,000 each due Alabama Acceptance (R. 166–167). As of the time of trial in April, 1960, the trustee in bankruptcy had collected only about $25,600 (which included collections by the co-receiver) (R. 219).

Throughout the corporate acquisition program of Alabama Acceptance, Frank Proctor & Associates received brokerage and management fees from Alabama Acceptance or its subsidiaries (R. 523–526, 530, 533, 541–542, 547–549, 552–553, 645–646, 658, 662, 749–750, 763–764, 1276, 1286, 1289, 1291, 1359,

1370, 1495–1496, 1607, 1728, 1737, 1856–1859. Money obtained by Associates was paid out to the petitioners in salaries, expense accounts and loans (R. 573–574, 1177, 1308–1309, 1310, 1497–1498, 1509, 1510–1511, 1751, 1845–1848). The books of Associates showed that, as of May 30, 1958, Greenhill had unpaid loans of about $30,000 while Proctor had unpaid loans of about $15,000 (R. 1509–1511, 1849). Forty percent of Greenhill's Florida expenses were paid for by Associates (R. 1751) and another 40% were paid by Alabama Acceptance. In addition, Alabama Acceptance made direct payments to petitioners and loaned Greenhill about $5,000 which was never repaid (R. 164–166, 442, 445–446, 456, 459, 474–475, 530–533, 547–549, 552–553, 564, 636, 644, 652, 657–658, 662, 1277, 1286–1289, 1711, 1717, 1751; see R. 1473–1474, 1685, 1711–1713, 1717, 1728).[4]

Throughout 1956 and 1957, Alabama Acceptance solicited investments through advertising in Alabama and Florida newspapers (R. 281–282, 311, 771, 787–788, 809–810, 828, 885, 934, 997–999, 1008, 1020, 1079–1080, 1842–1846). A typical advertisement (appearing

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[3] In early 1957, petitioners moved their "modest" offices in New York City from Broadway overlooking Times Square to a suite of offices on Madison Avenue (R. 430–431, 516–520). In the Madison Avenue suite, each petitioner had a "large" office; there was a large reception room and a kitchenette; and there were other offices (R. 516–520). All of the offices were "elaborately furnished" (R. 520).

[4] Greenhill made a number of trips to the Miami area of Florida, where Faulk solicited investments on behalf of Alabama Acceptance, and ran up hotel bills in substantial amounts at the Eden Roc Hotel, the Americana Hotel and the Fontainebleau (R. 1751–1754, 1776–1780).

in the *Birmingham News* of August 18, 1957) read as follows (R. 1080):

> Our business is putting money to work, eight per cent debenture bonds. Interest is the cost of doing business. Our income taxes are fifty-two per cent.

Petitioners made four or five trips to Alabama from 1956 to 1958 (R. 577–580, 632, 703, 711–712, 1156–1157, 1643, 1821). Proctor either "wrote up" or approved advertising materials for Alabama Acceptance during this period (R. 582–583, 842–843, 1862–1863; see R. 1842–1846, 1871–1874).

3. THE FRAUDULENT REPRESENTATIONS

From 1956 to early 1958, Alabama Acceptance solicited money from the general public for investment in 7 to 10% promissory notes and debentures of Alabama Acceptance. Wells operated as a securities saleman in Alabama while Faulk conducted sales operations in Florida. The investing public were made aware of opportunities for investment in Alabama Acceptance through use of the mails, advertising in Alabama and Florida newspapers and by word of mouth from Wells, Faulk and Murray. The government called twenty-one investors as witnesses who testified that, at intervals between 1956 and February 1958, they invested and reinvested sums of money between $50.00 and $25,000 in notes and debentures of Alabama Acceptance (R. 242–249, 265–266, 274, 276–277, 290–291, 305–306, 355–356, 358, 365–367, 369–370, 373–376, 382, 385, 388–389, 391, 402–403, 766–767, 772–775, 779–780, 782–784, 814, 817, 820, 833, 835, 844, 848–

857, 876–877, 881, 892–893, 901–905, 914–918, 921–922, 925, 928–930, 931–933, 938–939, 943–945, 952–953, 1007, 1009–1010, 1013, 1016–1017, 1093–1094, 1098, 1106–1107, 1109, 1153–1154, 1159, 1163–1164, 1167, 1169).

In its advertising program, Alabama Acceptance utilized a pamphlet entitled, "Alabama Acceptance Corporation—A Story of Interest." The pamphlet was printed in December 1956, and all of the information contained therein came from the petitioners (R. 839–843, 959–974, 979, 988; see R. 1646–1652, 1746–1750, 1780–1785, 1845–1846, 1866–1868). The pamphlet, which was handed or mailed to prospective as well as present investors (see *e.g.*, R. 864–865, 1020–1021, 1084–1085, 1095, 1100), recited that, as of January 1957, the "working capital" of Alabama Acceptance was in excess of $800,000 and its net worth was in excess of $600,000 (R. 1648–1649).

In October 1956, one investor received a circular through the mail which indicated that Alabama Acceptance had assets of $1,777,000 in 1955 (R. 768, 771). By letter of May 1957, another investor was informed that the capital and surplus of Alabama Acceptance at that time was in excess of $600,000, and that the safety of the proposed investment would be "controlled specifically by placing [it] in the same category as banks and financial institutions, thereby keeping [the] investment protected by a subordinated debenture issue" (R. 793, 794–196). In July 1957, an investor was told that Alabama Acceptance was making "good progress" in its business, and that an old couple had invested their life savings and were now living off their dividends (R. 778, 781). By

letter of January 1957, another investor was told that investments in Alabama Acceptance were secured by "seasoned automobile paper" (R. 812). This investor was subsequently informed by letter that Alabama Acceptance had increased its assets to $2,500,000 and net worth to more than $750,000 (R. 819). In March or April 1957, another investor was told that Alabama Acceptance had a net worth of $600,000 as of January 1957, that Alabama Acceptance made 16% on automobile paper, and that the company was in a high income tax bracket (R. 829–832). Another investor received a letter in early 1957 saying that the investments of Alabama Acceptance were regulated by the Securities Commission of Alabama, and that Alabama Acceptance paid federal income taxes of 52% (R. 870–871). Another investor was told that Alabama Acceptance was in a "very high income tax bracket", and that its interest costs therefore would be only about 4% (R. 885–886, 912–914). In January 1958, Wells told an investor that Alabama Acceptance was "doing fine", that it was purchasing "home appliances, stoves and refrigerators by the carload" (R. 853–855). In February 1958—one month before Alabama Acceptance went into bankruptcy—Murray told an investor that Alabama Acceptance did not carry government insurance on its investments, but that Alabama Acceptance was "as safe as anyone" and had never missed a single dividend (R. 934–936).

4. GOVERNMENT EXHIBIT NO. 62

Williams testified that he prepared Government Exhibit No. 62 from the books and records of the

Alabama Acceptance Corporation, and that it represented a summary or schedule of checks written by Alabama Acceptance from June 19, 1956, through December 31, 1957, in connection with its corporate acquisition and merger program (R. 521–522, 527). The schedule indicated that Alabama had written checks totaling $502,939 on the acquisition program (R. 529). Out of this figure, Greenhill received $23,726, of which $5,000 represented a loan from Alabama Acceptance; Associates received $53,787; and Murray received $9,050 (R. 529–530). Williams said that the schedule did not reflect $98,000 worth of checks drawn on a Pittsburgh bank for Greenhill, and $16,618 worth of checks drawn on that bank for Associates (R. 530–533).

Benjamin Markowe, a certified public accountant, testified for the defense that he examined Government Exhibit No. 62 and the books of Alabama Acceptance (R. 1271–1272), and that the exhibit contained numerous items which were properly chargeable to other accounts or payments (R. 1273–1274). He said that loans to Greenhill, advances to Murray, interest on loans, financing and legal fees, and other items, all of which totaled about $166,000, were improperly included in the $502,000 figure (R. 1274–1280, 1284). This left a balance invested in subsidiaries of about $346,572 (R. 1283), of which $298,000 was paid directly for investments (R. 1285, 1288). He said that the books of Alabama Acceptance were "poorly kept and inadequate as to disclosure of fact information", that there were errors and omissions, and that there was a "lack of complete informa-

tion insofar as these various organizations were concerned" (R. 1293).

On cross-examination, Mr. Markowe testified that of the $83,860 repayment of loans included in the $502,000 figure, there was repayment of a $42,000 loan to a Mr. Shakerinn, and that Alabama Acceptance had made repayments on loans from the Troop Water Heater Company (R. 1295–1299; see R. 1271, 1274). He testified, however, that he did not know whether Alabama Acceptance used the $42,000 loan from Mr. Shakerinn or the loans from the Troop Water Heater Company in the acquisition program (R. 1296–1300). He said that $5,000 constituted a loan repayment to a Mr. Jacobs, who formerly owned the Troop Water Heater Company; that he did not know what Alabama Acceptance did with the money borrowed from Mr. Jacobs; and that money came from Troop and went back to Troop—"sort of a current account" (R. 1300–1303, 1317–1318). Williams testified that Alabama Acceptance borrowed money from the Troop Water Heater Company in order to pay Mr. Jacobs who owned Troop (R. 718–719; see R. 1487, 1492, 1736, 1775).

ARGUMENT

1. Considering the evidence which the government did produce, summarized in the Statement, *supra*, there is no basis for the suggestion that the verdict could only have been the result of hostility. It may be that all of the financial machinations were not proved in every final detail, in large part because the

books were not properly kept,[5] but unquestionably there was ample evidence to show that Alabama Acceptance, with active stimulation and co-operation by the petitioners, sold notes and debentures to the public through false and misleading representations and that the mails were used in the process. That is all that had to be shown to prove guilt.

Petitioners' endeavor to attach great importance to Government Ex. 62, which, they say, was not prepared in accordance with precise accounting standards. But this was not the fault of the government. Petitioners cannot complain of lack of precision caused by their own failure to maintain complete and accurate records. *Bowen* v. *United States*, 153 F. 2d 747, 751 (C.A. 8), certiorari denied, 328 U.S. 835; *Brady* v. *United States*, 26 F. 2d 400, 402 (C.A. 9), certiorari denied, 278 U.S. 621. There was no obscurity about the fact that they grossly overreached the investing public.

Williams testified that he prepared this exhibit from the books and records of Alabama Acceptance, and that it represented a schedule or summary of checks written by Alabama Acceptance, between June 1956 and December 1957 on its corporate acquisition program (R. 521–522, 527). The schedule indicated

[5] Three accountants who had access to the books and records of Alabama Acceptance and/or the books and records of Frank Proctor & Associates, Roland Industries, Alabama Industries, Allen Capital Corporation, and Greenhill testified that the books were poorly kept and inaccurate, and that there were substantial omissions (See, *e.g.*, R. 536–537, 539, 622–624, 639–640, 710, 736–737, 751, 753–755, 1126–1127, 1140–1141, 1144–1145, 1293, 1296–1303, 1317–1318, 1494–1500, 1502–1505, 1507).

that, of the total amount of $502,939 spent on this program, there were checks of $23,726 payable to Greenhill and checks of $53,787 payable to Frank Proctor & Associates (R. 529–530). This disposes of the complaint (Pet. 9–10) that the exhibit left the "impression" that "the remainder of nearly $500,000 went to petitioners and their cohorts." The mere fact that an accountant witness for the defense was able to conclude that certain checks should not have been included in the summary—for example, the repayment of loans, assuming Alabama Acceptance had not used the money it borrowed in its acquisition program—did not detract from the *admissibility* of the exhibit; it would at best affect the *weight* of the exhibit. *Rudin* v. *United States*, 254 F. 2d 45, 49 (C.A. 6), certiorari denied, 357 U.S. 930.

2. By lumping together several different issues and discussing them in general terms, petitioners seek to convey the impression that they were denied a fair trial. A careful examination of the record shows that the contentions are without foundation.

a. Change of Venue. Petitioners do not directly challenge the denial of their motion for a change of venue, although they rely on the allegations in that motion that hostility had been engendered against them. The record shows that the publicity complained of, which was never detailed, occurred at about the time of the bankruptcy of Alabama Acceptance in March 1958 (See R. 58–59, 61–62, 99). The indictment was returned in the district court on September 4, 1959 (R. 12); the trial was originally set for February 2, 1960; and it did not actually begin until April

1960, having been postponed on the motion of Greenhill so that he would have time to examine records which the court ordered produced for inspection and discovery (See R. 63–65, 71). There is no showing of any great publicity at the time of trial. Indeed, neither in January 1960, when Greenhill moved for the continuance, which was granted, nor in March, when he unsuccessfully moved for a further continuance beyond April 14 did he ground the application upon alleged adverse publicity (R. 65–69, 71–81, 101–105, 108–114). No showing was made on the *voir dire* examination of the jury that any juror had been affected by adverse publicity regarding the case. At the beginning of trial, petitioner sought to have the jury sequestered, claiming that "publicity * * * *is going to be given* to the case in newspapers and on radio and television" (R. 100, emphasis added). The court admonished the jury throughout the trial that they were not to discuss the case and not to read or listen to any newspaper reports or television or radio coverage of the case (R. 177, 397, 603, 837, 1014, 1083, 1184, 1282, 1930).

The denial of the motion to change venue to New York under Rule 21(b), F.R. Crim. P., was clearly proper. The indictment indicated that most of the transactions alleged had occurred in Alabama; that all of the letters and advertising materials sent to investors were mailed from Alabama; that most of the letters and advertising materials alleged to have been mailed from Alabama were received by Alabama investors, and

that only one letter (count 7) was addressed to a New York investor (R. 12–43). There was no jurisdiction in New York to try 19 counts of the indictment since the mailings alleged in those counts (all but count 7) neither originated nor terminated within the Southern District of New York (R. 12–43). *United States* v. *Choate*, 276 F. 2d 724 (C.A. 5). The books and records of Alabama Acceptance, including all of the records and proceedings in the bankruptcy court, were in Alabama (see R. 71, 112). Greenhill was the only defendant who was not an Alabama resident (R. 56–57). Murray and the co-defendant salesmen did not enter pleas of *nolo contendere* until the day of trial (R. 114–118).

The court ordered that witnesses for the defense be subpoenaed at government expense and that the government make available to petitioners for inspection all records in the case (except work products of government attorneys and agents). Petitioners were also assured reasonable time and opportunity to interview their witnesses (R. 70–71, 93–95, 96, 104, 109, 112). And the court announced it would permit petitioners to subpoena witnesses during the trial (R. 104). Nor were these empty promises. While the trial was in progress, the court allowed the petitioners ample opportunities to interview witnesses, examine documents and the like (see *e.g.*, R. 1460–1461).

b. Government witnesses. The government called twenty-one investors as witnesses. One investor was 78 years of age, and another was blind (R. 1016, 1163–1170). One testified that he paid for his invest-

ment, out of life insurance proceeds received upon the death of his son (R. 1007, 1009); another testified that he used cash savings for his investment (R. 844, 853); and another testified that she used social security checks to pay for the investment (R. 931, 933). Most of the investors did not describe the source of the money used in the investments in question. It was petitioners' own acts which made these people available as witnesses to the fraud. It is too late to regret their choice of victims.

c. Government testimony. The charge that the government unnecessarily portrayed the petitioners as "big city operators from New York", and elicited irrelevant testimony concerning Greenhill's Florida expenses is unjustified. The evidence showed that petitioners were direct beneficiaries of funds from Alabama Acceptance and its subsidiaries, either through payments made to Frank Proctor & Associates which funneled down to the petitioners in the form of large salaries, loans and expense accounts, or through payments made directly to them. See the Statement, *supra.* Concurrently, petitioners moved their "modest" Broadway offices to a large suite of "elaborately furnished" offices on Madison Avenue. Greenhill, at least, enjoyed a high standard of hotel living while in Florida. That was relevant corroborative evidence. Apparently, petitioners considered themselves to be "big city operators". Certainly they cannot complain because the evidence of their conduct made them so appear.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1962.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 145

KALMAN GREENHILL and FRANK PROCTOR, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION TO VACATE AND REMAND

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July 25, 1962.

Press of Byron S. Adams, Washington, D. C.

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---

MOTION TO VACATE AND REMAND

Come now the petitioners in the above-entitled proceeding and move this Court for an order vacating the judgment below and remanding the case either (1) to the District Court with directions to grant petitioners a new trial in which all the proceedings are recorded and transcribed in accordance with the Court Reporter Act, 28 U.S.C.A. § 753(b), or (2) to the Court of Appeals for reconsideration in light of the Court Reporter Act, 28 U.S.C.A. § 753(b), and that court's decision in

Stephens v. *United States*, 289 F. 2d 308 (C.A. 5). As grounds for this motion, petitioners state as follows:

1. On May 25, 1962, petitioners herein filed a petition for a writ of certiorari, seeking review of the judgment of the Court of Appeals affirming their convictions for violations of the federal mail fraud and securities fraud statutes. The question presented for review in that petition (p. 2) was stated as follows:

> Whether a federal court conviction for fraud is consistent with that regularity and fairness which which should characterize the administration of justice in the federal courts where (1) the trial is conducted in an atmosphere of hostility and prejudice, and (2) the inadequacies of proof and explanation of complex financial transactions involved in the prosecution make the jury verdict untrustworthy and subject to the influences of hostility and prejudice.

2. Basic to that question is an appreciation of the entire atmosphere of the trial (which took place in the Northern District of Alabama) and particularly of those elements which expressed the hostility and prejudice directed toward the petitioners—described in the petition as efforts "by Government counsel to portray petitioners as rich big-city operators from New York who had bilked helpless Alabama citizens of their life savings." Pet., p. 7. Petitioners' geographical origins were emphasized and reiterated. And in this respect, petitioners assert that the critical factor exhibiting such geographical hostility and prejudice was contained in the final argument of the prosecutor to the jury, to which reference was made in the petition, pp. 7, 12. And it is that factor which underlies the question presented for review both in the court below and before this Court. To understand that ques-

tion and to resolve it properly requires an evaluation of the prosecutor's final summation to the jury. See *Malinski* v. *New York*, 324 U.S. 401, 433-434 (Murphy, J., dissenting in part).

3. Counsel for the petitioners on the appeal below and before this Court, who were not counsel at the trial, assumed that the complete transcript of the trial —including the summations to the jury—was available in support of the issue of hostility and prejudice. But when seeking to quote and analyze the prosecutor's summation, they discovered that the summation was not a part of the certified record. That transcript, which is on file with the Clerk of this Court, is composed of seven volumes, containing nearly 2000 pages. In Volume 7, page 1886, there appears the following:

> The Court: All right. Are you ready, Mr. Longshore?
>
> Mr. Longshore [the United States Attorney]: Yes, sir.
>
> The Court: Call in the jury then.
>
> (The jury returned to the courtroom and arguments were presented by respective counsel, at the conclusion of which an adjournment was taken until 9:00 o'clock A.M. the following morning, Saturday, April 30, 1960.)

Moreover, except for two sentences of the prosecutor's opening statement, to which an exception was sustained, the opening statements of various counsel are not contained in the certified trial transcript. See Volume 1, pp. 119-120.

4. Counsel, who assumed that the summations had been taken down by the court reporter (as required by

the Court Reporter Act, 28 U.S.C.A. § 753(b)) but not transcribed, then sought to obtain a transcription of those summations as a supplement to the certified record before this Court. But counsel then discovered that the court reporter had never recorded any portion of these final arguments. As stated in an affidavit of the reporter, Mr. A. B. Hale, which affidavit is on file with the Clerk of this Court and reproduced in full in the appendix hereto (p. 1a, *infra*):

> The closing arguments and final summation of counsel representing both the United States Government and the defendant were made in this cause. Affiant did not record any portion of the final argument of either counsel because it was his custom not to take down any such arguments. Affiant knows of no agreement made by counsel to the effect that this argument should not be recorded, but to the contrary affiant merely followed what had come to be his usual custom relative to not recording final arguments of counsel. No other court reporter was present during the trial of this cause.

5. In an effort to reconstruct the prejudicial factor contained in the prosecutor's summation, petitioners and their trial counsel have submitted affidavits as to their best recollection of what the prosecutor said. Those affidavits are on file with the Clerk of this Court and are reproduced in the appendix hereto. In pertinent part, these affidavits state:

AFFIDAVIT OF PETITIONER GREENHILL

> During the course of this summation Mr. Longshore upon many occasions, possibly as many as ten or fifteen occasions, referred to the fact that I came from the City of New York, that I had conducted my business in the City of New York and

was not familiar with the practices and the ethics and character of a southern city and a southern community. Mr. Longshore made reference to the fact that the business of both Mr. Proctor and myself was conducted in a highly extravagant and luxurious operation in a "big city."

I further respectfully recall continuous reference to the fact that Mr. Norman Williams was an accountant who lived and practiced in Birmingham, Alabama, who was a local citizen whose word could be taken at face value, and they would have to give more weight to his testimony than that of lawyers and certified public accountants who lived and practiced in the City of New York.

I further recall that upon many occasions and particularly towards the tail end of Mr. Longshore's summation, he referred to the fact that "these northerners" went to the South and particularly to Birmingham, Alabama, and thought they could easily deceive and hoodwink the "South" and its residents and inhabitants.

. . . . I respectfully submit that the major portion and the greater part of Mr. Longshore's summation dealt with "the South against the North" and continuous references in a similar vein.

AFFIDAVIT OF PETITIONER PROCTOR

Constant repetition was made of the fact that funds flowed from the South to the North and particularly over and over the phrase "these New Yorkers" or "these men from New York" was used.

I recall that reference was made several times in the summation to the fact that these New Yorkers came to Birmingham to do business with these witnesses. Reference was also made in the

summation to the New York offices that we have and the New York way of doing business.

A specific phrase recalled was one concerning Norman Williams, the accountant. The phrase was "We know Norman Williams and we believe what he says." . . .

The close of the summation was again devoted to the fact of the New Yorkers who had come into Birmingham and reference was made concerning New York witnesses and that accountants and lawyers had all been New Yorkers. . . .

AFFIDAVIT OF KARL B. FRIEDMAN, TRIAL COUNSEL

. . . During the course of the summation by Mr. Longshore, Mr. Greenhill and I had brief conversations in which we were both considerably disturbed by the continued references of Mr. Longshore to the fact that these people had come down from the north to take the money from the people in the south and that they had taken the money back up north and that nothing ever came south again. I remember some specific references to the fact that the offices of Frank Proctor and Associates in New York were very plush and elaborate like some fancy penthouse up in New York City. It seemed to me that the entire emphasis on the argument by Mr. Longshore was aimed at prejudicing the minds of the jury against Mr. Proctor and Mr. Greenhill because they came from New York.

6. It is thus indisputable that the court reporter never took down or recorded any portion of the prosecutor's final summation to the jury. And it is equally clear that the petitioners and their counsel never agreed or authorized the reporter not to record this summa-

tion. See also affidavit to that effect by L. Drew Redden, another trial counsel.

7. The failure of the reporter to record this summation, which he admits was due solely to "his usual custom", was in direct violation of the Court Reporter Act, 28 U.S.C.A. § 753(b), which provides in pertinent part:

> One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; * * *

The mandatory nature of this statutory command was emphasized by the Court of Appeals for the Fifth Circuit in *Stephens* v. *United States,* 289 F. 2d 308, 309, where it was held to be reversible error requiring a new trial for the court reporter to fail "to record certain proceedings had in open court, mainly, the examination of the veniremen *and the arguments of counsel to the jury.*" [Emphasis added.] In the words of the court, p. 309:

> Since the failure of the court reporter to observe the terms of the statute is undisputed and the result is that a full transcript is not available to us, we do not see how we can, under Rule 52(a), F.R. Cr. P., 18 U.S.C.A., adjudicate that there was no showing that any errors which might have been reflected by the transcript were harmless. This conclusion seems to be in line with whatever jurisprudence is available on the subject. [Citation was here made in a footnote to *Bruno* v. *United States,* 308 U.S. 287, and *Stansbury* v. *United States,* 219 F. 2d 165, 169 (C.A. 5)].

Moreover, in *Poole* v. *United States*, 250 F. 2d 396, 399, the Court of Appeals for the District of Columbia Circuit referred to the Court Reporter Act as imposing an unequivocal duty on the reporter to transcribe and certify in *every* criminal case the proceedings in open court; it further said that it is the "duty of the District Court to see that henceforth the court reporters comply with the provisions of 28 U.S.C. §753 (1952), in accordance with the unequivocal congressional intent." See also *Miller* v. *United States*, 317 U.S. 192, emphasizing the need for a verbatim record of all court proceedings, particularly in criminal cases.

8. The unwarranted violation of the Court Reporter Act has resulted in the absence of the complete record necessary to a fair and proper adjudication of petitioners' appeal from their convictions. As was the situation in the *Poole* case, neither the Court of Appeals nor even this Court can adjudicate the claimed errors growing out of the prosecutor's summation; nor can there be any determination whether any errors that might have been made in that summation were of the non-harmless variety within the meaning of Rule 52(a), F.R. Cr. P. The result is that the basic question presented for decision in the court below and in this Court cannot be intelligently resolved. Thus the entire appellate process open to these petitioners has been frustrated by the court reporter's illegal failure to record the summation.

9. From what has been indicated in the efforts to reconstruct the prosecutor's summation, errors have occurred herein whereby—in the setting of this case—it could well be concluded that the prosecutor had struck "foul blows" of geographic hostility "calculated to produce a wrongful conviction." See

Berger v. *United States*, 295 U.S. 78, 88. As was said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, "appeals to class prejudice are highly improper and cannot be condoned." So too as to geographic prejudice. Such improper conduct, of course, sometimes occurs in the course of a final summation to a jury and, when it does, courts have uniformly condemned and struck it down. See *New York Central R. Co.* v. *Johnson*, 279 U.S. 310; *United States* v. *Spangelet*, 258 F. 2d 338, 342-343 (C.A. 2); *United States* v. *Stromberg*, 268 F. 2d 256, 271 (C.A. 2); *Wallace* v. *United States*, 281 F. 2d 656, 667 (C.A. 4). And in view of the *prima facie* evidence of the geographical hostility exhibited in the summation, the nonexistence of prejudice flowing from the prosecutor's improper conduct cannot here be assumed. *Berger* v. *United States, supra.*

10. Petitioners submit that the claimed error in the prosecutor's summation infects the fairness of the trial. And because the fairness of the trial is the basic point in issue, this appeal cannot properly be resolved with a non-complete record. Even in those instances where alleged unfairness has been found to be unsustained by the record, the entire or relevant portions of the record have been available in order to make that judgment. See, e.g., *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-243. The very core of the alleged unfairness is missing from this record due not to any fault of petitioners but to the failure of the court reporter to perform his statutory duty. Where the court processes have so broken down that an appeal cannot be properly adjudicated, the proper remedy would seem to be to vacate the judgments of conviction and to remand for a new trial. *Stephens* v. *United*

States, 289 F. 2d 308 (C.A. 5).* At the very least, the matter should be remanded to the Court of Appeals to permit it to reevaluate the matter in light of this defect in the record.

11. So exceptional is this situation that such relief is appropriate even though the matter of the defect in the record was not pressed upon the court below. Cf. *Hormel* v. *Helvering*, 312 U.S. 552, 557; *United States* v. *Atkinson*, 297 U.S. 157, 160. Where an injustice might result—as it most certainly would if the court reporter's failure to fulfill his statutory duty makes this appeal meaningless—this Court should act to restore the right of these federal court defendants to a complete transcription of their trial proceeding. The very integrity of the right to appeal demands such corrective action.

Respectfully submitted,

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July 25, 1962.

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* Cf. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115; *Mesarosh* v. *United States*, 352 U.S. 1; *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233.

APPENDIX

APPENDIX

Affidavit of A. B. Hale

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, a notary public in and for said state and said county, personally appeared one A. B. Hale, who is known to me and who, after being duly sworn, deposes and says as follows:

Affiant's name and address is A. B. Hale, 9000 4th Avenue South, Birmingham, Alabama.

For a period of approximately 16 years affiant was the official court reporter of the United States District Court for the Southern Division of the Northern District of Alabama.

Affiant was the official court reporter charged with the responsibility of recording the testimony in the case of United States of America v. Kalman Greenhill, et al, Civil Action No. 14592, which was tried at Birmingham, Alabama, from the period of April 19, 1960 to April 30, 1960. The closing arguments and final summation of counsel representing both the United States Government and the defendant were made in this cause. None of these arguments, however, were either recorded or written up so as to become a part of the record in the cause. Affiant did not record any portion of the final argument of either counsel because it was his custom not to take down any such arguments. Affiant knows of no agreement made by counsel to the effect that this argument should not be recorded, but to the contrary affiant merely followed what had come to be his usual custom relative to not recording final arguments

of counsel. No other court reporter was present during the trial of this cause.

/s/ A. B. Hale
Affiant

Sworn to and subscribed before me this 7 day of June, 1962.

/s/ Harold I. Apolinsky
Notary Public

My commission expires: November 2, 1965

Affidavit of L. Drew Redden

State of Alabama)
Jefferson County)

Before me, a notary public in and for said state and county, personally appeared L. Drew Redden, who is known to me and who, after being duly sworn, deposes and says as follows:

Affiant's name is L. Drew Redden. Affiant is a duly licensed and practicing attorney in the City of Birmingham, Alabama. Affiant was counsel of record for Kalman Greenhill, in the case of United States of America v. Kalman Greenhill, et al, Civil Action No. 14592, in the Southern Division of the Northern District of Alabama, which was tried before the Honorable Hobart Grooms, United States District Judge, during the period of April 19, 1960, to April 30, 1960.

Counsel representing the United States Government as well as affiant made closing arguments to the jury in said cause. Affiant is informed that none of these closing arguments were recorded by the official court reporter, A. B. Hale. There was no agreement between counsel author-

izing said court reporter to refrain from recording said arguments.

/s/ L. Drew Redden
Affiant

Sworn to and subscribed before me this 7th day of June, 1962.

/s/ Harold I. Apolinsky
Notary Public

My commission expires: November 2, 1965

Affidavit of Kalman Greenhill

State of New York }
County of New York } ss

Kalman Greenhill being duly sworn deposes and says:

I am one of the Petitioners in the above entitled action and reside at 9480 Charleville Boulevard, Beverly Hills, California. I am making this affidavit in connection with a petition for a writ of certiorari to the United States Court of Appeals for the Fifth District.

I will attempt to recall in as much detail as I can remember both general and specific statements made by Mr. Longshore, who was the United States Attorney in Birmingham, Alabama, and who tried this matter in the United States District Court for the Northern District of Alabama.

During the course of this summation Mr. Longshore upon many occasions, possibly as many as ten or fifteen occasions, referred to the fact that I came from the City of New York, that I had conducted my business in the City of New York and was not familiar with the practices and the ethics and character of a southern city and a south-

ern community. Mr. Longshore made reference to the fact that the business of both Mr. Proctor and myself was conducted in a highly extravagant and luxurious operation in a "big city."

I further respectfully recall continous reference to the fact that Mr. Norman Williams was an accountant who lived and practiced in Birmingham, Alabama, who was a local citizen whose word could be taken at face value, and they would have to give more weight to his testimony than that of lawyers and certified public accountants who lived and practiced in the City of New York.

I further recall that upon many occasions and particularly towards the tail end of Mr. Longshore's summation, he referred to the fact that "these northerners" went to the South and particularly to Birmingham, Alabama, and thought that they could easily deceive and hoodwink the "South" and its residents and inhabitants.

It is extremely difficult in view of the time which has elapsed to recall in more specific form any particular and detailed references. However, I respectfully submit that the major portion and the greater part of Mr. Longshore's summation dealt with "the South against the North" and continuous references in a similar vein.

/s/ KALMAN GREENHILL

Sworn to before me this 14th day of June, 1962.

/s/ MILDRED KORLAND
Notary Public, State of New York

Commission expires March 30, 1963

Affidavit of Frank Proctor

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

FRANK PROCTOR, being duly sworn deposes and says:

I am one of the Petitioners for a writ of certiorari to the United States Court of Appeals for the Fifth District. I reside at Scarsdale Manor, Scarsdale, New York. This affidavit pertains to the summation of Mr. Longshore who was the United States Attorney in the Birmingham Court that tried this case in April of 1960. My recollection is that Mr. Longshore's summation was of some 45 minutes' duration. Constant repetition was made of the fact that funds flowed from the South to the North and particularly over and over the phrase "these New Yorkers" or "these men from New York" was used.

I recall that reference was made several times in the summation to the fact that these New Yorkers came to Birmingham to do business with these witnesses. Reference was also made in the summation to the New York offices that we have and the New York way of doing business.

A specific phrase recalled was one concerning Norman Williams, the accountant. The phrase was "We know Norman Williams and we believe what he says." In connection, the statement was repeatedly made concerning the flow of $500,000 as outlined on charts prepared by Norman Williams.

The close of the summation was again devoted to the fact of the New Yorkers who had come into Birmingham and reference made concerning New York witnesses and that accountants and attorneys had all been New Yorkers. Specific statements from 2 years ago cannot be recalled other than the phrasing concerning Norman Williams but

the entire summation was dominated by the aforementioned flow of funds South to North and New Yorker offices.

/s/ FRANK PROCTOR

Sworn to before me this 11th day of June, 1962.

/s/ JOHN S. SETRIAN
Notary Public, State of New York.

Commission expires March 30, 1963

Affidavit of Karl B. Friedman

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned authority, in and for said county in said state personally appeared Karl B. Friedman who being known to me and being by me first duly sworn did depose and say on his oath as follows:

"I am Karl B. Friedman, a resident of Birmingham, Alabama, and a practicing attorney here in Birmingham, Alabama. I commenced to represent Kalman Greenhill, and for a period of time Frank Proctor, in the spring of 1958. I assisted in the trial of the criminal proceedings in the United States District Court for the Southern Division of the Northern District in the State of Alabama wherein Kalman Greenhill and Frank Proctor, along with others were indicted and tried,

"I am very certain that defense counsel did not enter into any agreement or understanding with the prosecuting attorney or with the court in respect to the recordation and transcription of the closing arguments. I was not aware that such were not recorded and transcribed. I recall very clearly sitting at the trial table with Mr. Greenhill to my left, and Mr. Redden to my right. To the right of Mr.

Redden was Mr. Proctor, to his right was Colonel John D. Hill. Further down the table to the right were an assistant District Attorney to government representatives, and finally the prosecuting attorney, Mr. Longshore. During the course of the summation by Mr. Longshore, Mr. Greenhill and I had brief conversations in which we were both considerably disturbed by the continued references of Mr. Longshore to the fact that these people had come down from the north to take the money from the people in the south and that they had taken the money back up north and that nothing ever came south again. I remember some specific references to the fact that the offices of Frank Proctor and Associates in New York were very plush and elaborate like some fancy penthouse up in New York City. It seemed to me that the entire emphasis on the argument by Mr. Longshore was aimed at prejudicing the minds of the jury against Mr. Proctor and Mr. Greenhill because they came from New York.

"I cannot develop a specific recollection of the actual verbage or language used, but I do know that I have had many conversations with Mr. Greenhill, and with the various other attorneys interested in the case about the emphasis which was placed as indicated above and these constitute my best recollections."

/s/ KARL B. FRIEDMAN

Sworn to and subscribed before me this the 14th day of June, 1962.

/s/ ANNE K. HEFLIN
Notary Public

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No. 146

In the Supreme Court of the United States

October Term, 1892

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 145

KALMAN GREENHILL AND FRANK PROCTOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON MOTION TO VACATE AND REMAND

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Although petitioners were appellants in the court below and therefore responsible for presenting to that court the record on which they wished the cause to be judged, now, after the conviction has been affirmed and a petition for a writ of certiorari has been filed, they ask this Court to vacate the judgment and remand the cause to the district court for a new trial, or to the court of appeals for reconsideration, on the ground that the arguments of counsel were not recorded by the court reporter. This issue is raised for the first time on the present motion although the relevant facts were, of course, available at trial, dur-

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ing the pendency of the appeal and at the time of preparing the petition for certiorari. The motion comes too late to warrant consideration. See *Lawn* v. *United States*, 355 U.S. 339, fn. 16 at 362–363. Cf. *Giordenello* v. *United States*, 357 U.S. 480, 488; *Husty* v. *United States*, 282 U.S. 694, 701–702; *Duignan* v. *United States*, 274 U.S. 195, 200.

The trial commenced and was concluded in April 1960. Petitioners have annexed to their motion an affidavit by the court reporter to the effect that, in accordance with the then usual practice in the Northern District of Alabama, he did not record the arguments of counsel. However, as the appended affidavits of the reporter (Appendix A, *infra*) and of a deputy clerk (Appendix B, *infra*) show, the reporter was in the courtroom during the arguments for the purpose of noting objections by either side and any ruling which the court might render at such time. Neither side objected to this custom, nor was any objection made to any part of the arguments (R. 1886), despite the claim of trial counsel that he had been "disturbed" by the argument.

In their motions for new trial, filed on May 10, 1960, the petitioners did not complain of the practice of not recording the oral arguments, nor did they complain of any portion of the arguments to the jury made by the United States Attorney (R. 1939–1953, 1954–1968).

On April 18, 1961, the Court of Appeals for the Fifth Circuit decided *Stephens* v. *United States*, 289 F. 2d 308, holding it reversible error for the court

reporter to fail to record, *inter alia*, the arguments of counsel to the jury in a criminal case as required by the Court Reporter Act, 28 U.S.C. 753(b). On August 25, 1961, the petitioners filed their brief on appeal with the court of appeals. Neither then, nor on petition for rehearing, did they complain that in the trial court the arguments to the jury had not been recorded. Nor did they allege that the United States Attorney had made improper remarks in his argument to the jury.

In their petition for a writ of certiorari, filed in this Court on May 25, 1962, the petitioners did not challenge the failure to record the arguments of counsel. In very general fashion (Pet. 7), they merely complained that the United States Attorney had made efforts to portray petitioners as rich big-city operators from New York.

In the absence of timely objection in the trial court, alleged misconduct of government counsel would be ground for reversal only if so grossly prejudicial as to amount to plain error under Rule 52, F.R. Crim. P. Normally, a defendant cannot deliberately forego an opportunity to obtain relief from the trial court (*e.g.*, curtailment of any such improper conduct, instructions to the jury to disregard any improper argument, etc.), and save the point for appeal. See, *e.g.*, *Kreinbring* v. *United States*, 216 F. 2d 671, 673 (C.A. 8); *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); 84 A.L.R. 784, 795–796. Nor can he wait until the memory of witnesses is so faded that it is impossible accurately to reconstruct the record.

The best indication that petitioners have no serious complaint is that, not only was there no objection at trial, but appellate counsel did not consider the question worth arguing to the court of appeals, although their brief was filed after the *Stephens* decision on which they rely. In the light of these facts and the overwhelming evidence against petitioners summarized in the government's brief in opposition, the claim that counsel's argument amounted to plain error under Rule 52 is unconvincing. There is accordingly no reason to remand the cause.

For the reasons set forth, it is respectfully submitted that the motion to vacate and remand should be denied.

ARCHIBALD COX,
Solicitor General.

AUGUST 1962.

APPENDIX A

Affidavit of Arthur B. Hale, 9000 Fourth Avenue, South Birmingham, Alabama

STATE OF ALABAMA,
County of Jefferson:

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared Arthur B. Hale, who is known to me and who, after being duly sworn, deposes and says as follows:

Affiant was an official court reporter for the United States District Court, Northern District of Alabama, when the case of the United States vs Kalman Greenhill and Frank Proctor, Case No. 14,592 Southern, was tried in the Southern Division of the Northern District of Alabama during the month of April 1960. Affiant was personally present during the trial of this case and personally transcribed the proceedings therein. Further, affiant was present during the entire oral arguments of counsel for both the United States and the defense for the purpose of noting objections by either party, and, or for any other purpose at the direction of the Court or counsel for either party.

During said oral arguments, no objections were made by counsel for either the United States or for the defense.

Done the 10th day of August, 1962.

ARTHUR B. HALE, *Affiant.*

Sworn to and subscribed before me at Birmingham, Alabama, this 10th day of August, 1962.

LESTER H. JONES,
Deputy Clerk, U.S. District Court.

APPENDIX B

Affidavit of Dan C. Strong

UNITED STATES OF AMERICA,
Northern District of Alabama:

Before me, the undersigned authority, appeared Dan C. Strong to me known who deposes and says:

I am a deputy clerk in the United States District Court for the Northern District of Alabama and was such on April 29, 1960. I was the courtroom deputy clerk during the trial of United States of America vs. Kalman Greenhill and Francis E. Procter, Jr. I have an independent recollection of court reporter A. B. Hale's being present during the argument of counsel. Upon reviewing notes that I made during the trial, I find that the arguments were made on April 29, 1960, from 2:02 p.m. to 5:14 p.m.

DAN C. STRONG, *Affiant.*

Sworn to and subscribed before me at Birmingham, Alabama, this the 2nd day of August, 1962.

WILLIAM E. DAVIS,
Clerk, United States District Court,
Northern District of Alabama.

U.S. GOVERNMENT PRINTING OFFICE: 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 145

KALMAN GREENHILL and FRANK PROCTOR, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Motion to Vacate and Remand

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

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Kalman Greenhill

LEON D. HUBERT, JR.
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Counsel for Petitioner
Frank Proctor

August 24, 1962.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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UNITED STATES OF AMERICA, *Respondent*.

On Motion to Vacate and Remand

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

In response to the Government's memorandum in opposition to the motion to vacate and remand this cause, petitioners state as follows:

1. The total failure of the court reporter to obey the command of the Court Reporter Act by recording the arguments to the jury is conceded. Indeed, the additional fact revealed in the supplemental affidavit of

the reporter (Govt. Mem., App. A) underscores that failure; the reporter there states that he was in fact in the courtroom during the arguments, yet failed to record them. No excuse or justification for this failure is offered by the Government.

Moreover, the Government presents no effective refutation of the petitioners' sworn allegations (Motion, pp. 3a-5a) that the prosecutor's summation to the jury did contain numerous and cumulative inflammatory statements generating an atmosphere of geographical hostility toward petitioners. So plainly erroneous is this misconduct by the prosecution that it cannot be readily dismissed by any of the technical or procedural objections now urged by the Government. The inability to recreate the summation in its original and complete form, an inability in no way attributable to petitioners, necessitates the relief suggested by petitioners by their motion herein.

The fact that the reporter recorded no objections made by either counsel is irrelevant. If no objections were made to the prosecutor's remarks, the plain error doctrine of Rule 52(b), Fed. Rules Cr. Proc., comes into operation, a doctrine which presupposes the absence of objections at the time of trial.[1] But to determine whether there was plain error in the summation, a complete transcript of that summation is essential, especially where the prejudicial remarks are cumulative and spread over the entire summation. The unwarranted failure of the reporter to record such a

[1] The Government concedes (Mem., p. 3) that the alleged misconduct of government counsel is ground for reversal "if so grossly prejudicial as to amount to plain error under Rule 52, F. R. Crim. P."

summation wholly frustrates the appeal process and the capacity of an appellate court to note or correct plain errors.[2]

Obviously, the whole purpose of the Court Reporter Act is to insure a complete transcript of the trial proceedings so as to give the litigants and the appellate courts the essential basis for discovering and adjudicating possible errors. Without each and every element of those proceedings being available in transcribed form, basic rights of defendants can become irretrievably lost. And the fairness of the federal appellate process disappears.

2. The Government would have this Court ignore the patent violation of the Court Reporter Act by reason of the failure of the petitioners to complain of that violation in the courts below. But there is no indication that the petitioners or their counsel were aware that the court reporter, who was present at the time of oral summations, was not recording such arguments. More significantly, a defect in the record which frustrates the appeal process is so fundamental in nature that it can be raised at any point and appropriate corrective action taken.

The recent decision of the Fourth Circuit in *United States* v. *Taylor*, 303 F. 2d 165, 169 (C.A. 4), demonstrates this principle. There the failure of the court

[2] Even if an objection to the summation had been made and denied, transcribing merely the objection and the ruling thereon would have furnished little or no light on what the prosecutor actually said. Only a verbatim transcript of all the remarks, taken down as they are uttered, permits a trustworthy judgment as to possible prejudice. Moreover, where the prejudicial remarks are cumulative, as here alleged, it is essential that the complete summation be available so as to judge its total thrust and impact.

reporter to record a significant portion of the trial court proceedings made it impossible to resolve an issue raised in a collateral proceeding under 28 U.S.C. § 2255. Recognizing that this defect in the record vitally affected the defendant's right to pursue his § 2255 remedy, the Fourth Circuit took corrective action in light of that defect—even though the violation of the Court Reporter Act had not previously been raised at any point in the trial court or on direct appeal. See also *Poole* v. *United States*, 250 F. 2d 396, 399 (App. D.C.). Plainly, then, such a matter can be raised for the first time on a direct appeal as is here involved.

In this case, where the failure to record the summation makes impossible a resolution of the basic issue of hostility at the trial, the decision of the Fifth Circuit in *Stephens* v. *United States*, 289 F. 2d 308 (C.A. 5), points the way to the appropriate corrective action. And in the *Stephens* case itself, the defect was raised and corrective action taken at the appellate level, the matter not having been raised before the trial court.

3. The Government's reference (Mem., p. 4) to what it describes as "the overwhelming evidence against petitioners summarized in the government's brief in opposition" cannot serve as an excuse for the reporter's failure to record the summation to the jury. Nor can it cast any light on whether that summation amounted to plain error under Rule 52. Prejudicial error of this nature is a factor having no necessary relation to the guilt or innocence of the defendant. Fundamental concepts of fair criminal justice require that courts

outlaw such an error whenever it appears. *Berger* v. *United States*, 295 U.S. 78.

Respectfully submitted,

DUDLEY YOEDICKE
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New Orleans, Louisiana

EUGENE GRESSMAN
1730 K Street, N.W.
Washington 6, D. C.

Counsel for Petitioner
Kalman Greenhill

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Counsel for Petitioner
Frank Proctor

August 24, 1962.